No. 77-1713

In the Supreme Court of the United States

OCTOBER TERM, 1978

MAJID TAERGHODSI AND NEZAM YOUSEFI, PETITIONERS

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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CITATIONS

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OPINION BELOW

The orders of the court of appeals (Pet. App. B-1 to B-4) are not reported. The opinions of the Board of Immigration Appeals (Pet. App. A-1 to A-18) are not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on February 28, 1978 (petitioner Yousefi)[1] and on March 2, 1978 (petitioner Taerghodsi). The petition

[1] The court of appeals order reprinted at Pet. App. B-3 to B-4 appears to have been misdated March 2, 1978. Petitioner refers to the correct date in the body of his petition (Pet. 2, 8).

for a writ of certiorari was filed on May 31, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government is estopped from deporting petitioners if it failed to comply with an internal regulation regarding periodic meetings with foreign students by officers of the Immigration and Naturalization Service.

2. Whether petitioners were victims of discriminatory enforcement of the immigration laws based on their political associations.

3. Whether the evidence seized from petitioner Taerghodsi at the time of his arrest and statements subsequently made by him were properly admitted at his deportation hearing.

STATEMENT

On May 1, 1976, petitioners, who are natives and citizens of Iran, were arrested by local police officers in Houston, Texas, apparently for a traffic violation committed after their participation in a political demonstration (Pet. App. A-9 to A-10; see Pet. App. A-2). Petitioners were asked to produce their passports and visas but were unable to do so (Pet. 5). Petitioners were transported to the police station and detained there for further investigation by the Immigration and Naturalization Service (INS). Petitioners' personal effects were confiscated at the police

station (Pet. App. A-10). Among petitioner Taerghodsi's personal effects was a card identifying him as an employee of the Marriott Corporation (Pet. App. A-10).

The day after the arrests, Thomas E. Wilson, a criminal investigator for the INS, visited the city jail as part of his regular duties (Tr. 74-76).[2] He questioned petitioners, who admitted that they were aliens, but who did not have any documentation showing their immigration status in their possession (Tr. 77, 86). Accordingly, petitioners were taken to the Immigration Office for further investigation, and their personal effects were turned over to INS officers.

Thereafter an order to show cause was issued charging that petitioner Yousefi had remained in the United States beyond the date authorized in his student visa (April 19, 1976), in violation of 8 U.S.C. 1251(a)(2) (Pet. App. A-2). A second order to show cause was issued charging that petitioner Taerghodsi had been employed by the Marriott Corporation in Houston, Texas, in violation of the terms of his student visa and without authorization of the INS, and that he was therefore subject to deportation pursuant to 8 U.S.C. 1251(a)(9) (Pet. App. A-10). Petitioners' cases were jointly heard by an Immigration Judge on June 16, October 27, and November 15, 1976.

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[2] "Tr." refers to the transcript of the deportation hearings conducted on June 16, October 27, and November 15, 1976 (Pet. App. A-10). The consolidated hearing involved petitioners and three other aliens arrested with them (see Pet. App. A-3, A-11 to A-14).

At the deportation hearing, petitioner Yousefi admitted that he was a native and citizen of Iran, that he had entered this country as a non-immigrant student, that he had previously applied for and received an extension of his visa until April 19, 1976, and that he had not applied for permission to stay beyond that date (Tr. 9-10, 15; Exh. 1). On December 7, 1976, the Immigration Judge found that Yousefi was subject to deportation pursuant to Section 241(a)(2) of the Immigration and Nationality Act, 66 Stat. 204, as amended, 8 U.S.C. 1251(a)(2), because he had overstayed his visa (Pet. App. A-1). Yousefi was granted voluntary departure in lieu of deportation (*ibid.*).

At the same hearing, petitioner Taerghodsi admitted that he was a native and citizen of Iran admitted into the United States on a student visa in 1971, and that he had been employed by the Marriott Corporation without authorization from the INS to accept employment (Tr. 26-28). On December 9, 1976, the Immigration Judge found that he was subject to deportation pursuant to Section 241(a)(9) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(9), because he had failed to comply with the conditions of his admission into this country (Pet. App. A-9). Taerghodsi was also granted voluntary departure in lieu of deportation (*ibid.*).

The Board of Immigration Appeals dismissed petitioners' appeals (Pet. App. A-7, A-16), and the court of appeals summarily affirmed the Board's orders that petitioners be deported if they did not depart voluntarily (Pet. App. B-1 to B-4).

ARGUMENT

1. Petitioner Yousefi's petition for a writ of certiorari was filed out of time. The judgment of the court of appeals in his case was entered on February 28, 1978 (see p. 1 and n. 1, *supra*). It is well established that deportation proceedings are civil, not criminal, in nature. *Woodby* v. *Immigration and Naturalization Service*, 385 U.S. 276, 285; *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 594-595. The time for filing a petition for certiorari was not extended, and accordingly the 90-day period provided by 28 U.S.C. 2101(c) for petitioning in civil cases expired on May 30, 1978.[3] The petition was filed on May 31, 1978. The time limit imposed by 28 U.S.C. 2101(c) is jurisdictional. *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U.S. 399, 418. Accordingly, the petition should be denied with respect to petitioner Yousefi.

2. Two of the claims raised by petitioner Taerghodsi are not properly presented by him. Petitioner contends first (Pet. 9-12) that the government is estopped from deporting him because of its alleged failure to comply with an Operating Instruction concerning meetings by INS officials with foreign students; and second (Pet. 12-14), that he was the victim of selective prosecution because of his political activities. At the deportation hearing and on administrative appeal, however, Taerghodsi did not join the aliens who raised these contentions (Pet. App. A-17

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[3] May 29, 1978 was a legal holiday.

n. 5). Nor did Taerghodsi raise these points in the court of appeals. Accordingly, it is unnecessary for this Court to review these claims by petitioner Taerghodsi. See *United States* v. *Lovasco*, 431 U.S. 783, 788-789 n. 7; *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2. In any event, the claims are without merit.

(a) Petitioner contends (Pet. 9-12) that the government is estopped from deporting him because it failed to comply with Operating Instruction 214.2 (f) (7), which provides that officers of the INS shall meet with foreign students and their advisors "at least once a year, where practicable * * *," in order "to assure that these students and their advisors have maximum understanding of law, regulations, and procedures governing nonimmigrant students * * *."[4]

[4] The instruction reads, in relevant part:

> To establish and promote a more meaningful relationship between the Service and foreign students and to assure that these students and their advisors have maximum understanding of law, regulations, and procedures governing nonimmigrant students, district directors, and other officers of field offices shall meet with the foreign students of colleges and universities within their jurisdiction and with foreign student advisors. These meetings should be held at least once a year, where practicable, preferably at the beginning of the scholastic year. The Service officers should discuss with and explain to the foreign students, in a friendly, cordial, and sociable atmosphere conducive to promoting a mutual attitude of cooperation and assistance, their privileges and obligations as nonimmigrants and impress upon them the willingness of this Service to assist them with their immigration problems.

Petitioner claims that the instruction places an affirmative duty on the INS, that the Service failed to fulfill this duty, and that the government is therefore precluded from deporting him.

The evidence at the deportation hearing showed, however, that the INS had conducted meetings with foreign students and foreign-student advisors in the Houston areas "at least three times a year" during the three previous years (Tr. 140-141). These meetings usually involved a group of foreign-student advisors, but on occasion there were orientation sessions with the foreign students, including those at the university attended by petitioner Taerghodsi (Tr. 138). During these meetings, an INS officer explained various laws and regulations affecting the foreign students (Tr. 141). Accordingly, as the Board of Immigration Appeals found (Pet. App. A-5), "the Service in this case has complied substantially with [the instruction's] terms."

But even if the INS failed to comply with the instruction, Taerghodsi was not prejudiced. The purpose of the instruction is to assist foreign students in maintaining awareness of the laws and regulations governing their continued stay in this country. Taerghodsi does not contend that he was unaware of the requirement that he obtain authorization from the INS before he could accept employment.[5] He therefore has not established the detrimental reliance re-

[5] Petitioner Yousefi obtained an extension of his stay (Tr. 10), and therefore it is clear that he was aware that he was required to apply for such extensions.

quired to invoke an estoppel remedy. Cf. *In re Petition of LaVoie*, 349 F. Supp. 68, 72-75 (D. V.I.); *Gestuvo* v. *District Director of U.S. Immigration and Naturalization Service*, 337 F. Supp. 1093 (C.D. Cal.).[6]

(b) Nor is there merit to petitioner's claim (Pet. 12-14) that he was the victim of discriminatory enforcement of the law based on his political associations.

The decision whether to institute a deportation proceeding is within the discretion of the district director. Since petitioner's acceptance of employment without the prior approval of the INS violated the express terms of his admission to this country as a nonimmigrant student (see 8 C.F.R. 214.2(f)(6)), it constituted a proper ground for deportation, and one commonly invoked in similar circumstances. See 1 C. Gordon and H. Rosenfield, *Immigration Law and Procedure*, § 49, p. 4-86 (Rev. ed. 1977) and cases cited; *David* v. *Immigration and Naturalization*

[6] Petitioner's reliance (Pet. 10-11) on *United States ex rel. Parco* v. *Morris*, 426 F. Supp. 976 (E.D. Pa.), is misplaced. In *Parco* the INS issued a memorandum rescinding an Operating Instruction that would have authorized the grant of the plaintiffs' applications for extended voluntary departures. The rescission was not published in the Federal Register. The court found that the repeal of the instruction was a " 'general statement of policy' " required to be published in the Federal Register under 5 U.S.C. 552(a)(1), and therefore "a person without notice cannot be adversely affected." *United States ex rel. Parco* v. *Morris, supra*, 426 F. Supp. at 986. In this case, however, the INS did not formally rescind an instruction to the detriment of petitioner, nor did it implicitly rescind the instruction by noncompliance.

Service, 548 F.2d 219 (C.A. 8); *Ojeda-Vinales* v. *Immigration and Naturalization Service*, 523 F.2d 286 (C.A. 2).

Petitioner's contention that deportation proceedings were instituted in this case because of his political activity is based on evidence that is at most ambiguous. The INS control card attached to petitioner's file included the notation "Iranian Students Association" (Pet. App. A-6; Exh. 4). At the deportation hearing, an INS investigator, questioned about the significance of this notation, responded that "when the supervisor assigns a certain type of case, the real type of case, I'm not sure" (Tr. 86-87). He further stated, "I don't know why he has *Iranian Student Association*" (Tr. 87; emphasis in original). Accordingly, the Board of Immigration Appeals concluded (Pet. App. A-6 to A-7):

> [T]here is nothing in the record that the [petitioner[7]] has pointed us to which would sustain the heavy burden of showing an abuse of discretion by the District Director in this case. The investigator's statement, without more, is clearly insufficient to establish that there has been any abuse of discretion. It is ambiguous and the [petitioner] has furnished us with no evidence which would tend to substantiate his charge that this statement should be read to indicate a desire to effect his deportation solely because of his political beliefs.

[7] As noted above, petitioner Taerghodsi did not raise this claim before the Board; the Board's statement refers to petitioner Yousefi.

Finding that petitioner's deportability had been established by "clear, convincing, and unequivocal evidence" (Pet. App. A-7), the Board dismissed petitioner's[8] appeal. Since the Board's decision was supported by substantial evidence, the court of appeals correctly refused to disturb its finding.

3. Finally, Taerghodsi contends (Pet. 14-15) that inadmissible evidence was used as the basis for the finding of deportability. He argues that his arrest by Houston police was unlawful, and that tangible evidence seized incident to his arrest and statements he subsequently made to the immigration officers were therefore inadmissible. When petitioner was arrested, the police seized his personal effects, including his employee identification card; this card was later turned over to the immigration authorities and admitted into evidence at the deportation hearing. The Immigration Judge denied petitioner's motion to suppress without passing on the legality of petitioner's arrest, and the Board of Immigration Appeals affirmed (Pet. App. A-15).

Contrary to petitioner's contentions, even if evidence was unlawfully seized from him, that illegality would not render the evidence inadmissible in a federal deportation hearing. Deportation proceedings are civil in nature. See p. 5, *supra*. In *United States* v. *Janis*, 428 U.S. 433, this Court held that where—as here—the claim is that the evidence was unlawfully seized by state criminal enforcement offi-

[8] See note 7, *supra*.

cials, the likelihood that unlawful state police conduct would be deterred by exclusion of this evidence from federal civil proceedings is insufficient to warrant the application of an exclusionary rule. See *Cuevas-Ortega* v. *Immigration and Naturalization Service*, C.A. 9, No. 77-1630, decided May 3, 1978.

In any event, at the deportation hearing petitioner admitted his employment; as the Board of Immigration Appeals held (Pet. App. A-15), this evidence was sufficient, without reference to his employee card or other evidence seized at the time of his allegedly unlawful arrest,[9] to establish his deportability under 8 U.S.C. 1251(a)(1).

[9] Petitioner contends (Pet. 15) that his "subsequent statements given over objection of counsel" should also have been excluded, without identifying any particular statements. Since no statements made by petitioner prior to the deportation hearing were admitted into evidence, it appears that petitioner contends that his admissions during the deportation hearing were the "fruit" of his illegal arrest. However, any taint of the arrest, if unlawful, was superseded by petitioner's exercise of will in testifying at the hearing. See *United States* v. *Ceccolini*, No. 76-1151, decided March 21, 1978; cf. *Michigan* v. *Tucker*, 417 U.S. 433. This case is different from *Navia-Duran* v. *Immigration and Naturalization Service*, 568 F.2d 803 (C.A. 1), on which petitioner relies (Pet. 15), because that case involved the admissibility of an alien's statement made immediately following her arrest, while she was still in custody, which the alien contended were involuntary because of the circumstances of her interrogation and which were the sole evidence establishing deportability.

Petitioner also sought to invoke his privilege against self-incrimination to avoid testifying. The immigration judge properly concluded that petitioner could not invoke the privilege against self-incrimination, which may be raised by an alien in deportation proceedings only if his response would

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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tend to implicate him in a crime. *Chavez-Raya* v. *Immigration and Naturalization Service*, 519 F.2d 397, 401 (C.A. 7). The alleged violation here—unauthorized employment—was not a criminal offense, nor did any of the questions asked of petitioner elicit incriminating responses.

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